No. 260

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

MARTIN A. HIRSCH,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit entered July 19, 1943, affirming a judgment of conviction in this criminal cause.

Opinions Below

There was no opinion in the District Court.

The opinion of the Circuit Court of Appeals has not yet been reported but it is printed at the end of the record submitted herewith. The numbers of the pages are not yet available.

Jurisdiction

The jurisdiction of this Court is invoked under Section 24(a) of the Judicial Code, as amended by the Act of February 13, 1925 (Sec. 347, Title 28, U. S. C.).

Questions Presented

1. Is the requirement of Title 18, Section 231 of the United States Code, that false testimony be on a "material matter," satisfied when false testimony before a Grand Jury is material to an issue created solely by sheer assumption of a fact, not only unsupported by any evidence, but contrary to the only evidence in the record; or must it be material to an issue created by evidence?

2. When the determination of what is "material matter" (18 U. S. C., Sec. 231) in a Grand Jury investigation depends upon the existence of a fact, may that fact be assumed so as to cast the burden of disproving it upon the defendant; or according to fundamental rules of criminal law is the burden of proof beyond a reasonable doubt always on the prosecution?

3. When the determination of "material matter" depends on questions of fact on which there is conflicting evidence, may the Trial Judge determine those questions of fact adversely to the defendant in a criminal case and, on such determination, charge as matter of law that defendant's false testimony was on "material matter"; or, according to well-settled rules of criminal procedure, must the questions of fact be submitted to the trial jury for its determination?

4. In a Grand Jury inquiry, what is the test of whether testimony is on "material matter" as required by Title 18, Section 231, United States Code?

5. Did the Trial Court err in charging the trial jury as matter of law that petitioner's false testimony was on a "material matter"?

Statute Involved

Title 18, Section 231, United States Code, provides:

> "SECTION 231. (Criminal Code, section 125.) PERJURY. Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than $2,000 and imprisoned not more than five years."

Statement

The indictment, consisting of one count, alleges that petitioner committed perjury before the May, 1941, Grand Jury of the Southern District of New York by falsely testifying before that body that he had loaned $5,000 to one Leo Levy. The indictment alleges that such false testimony was material to an investigation then being conducted by the Grand Jury into a violation of Section 420a, Title 18 of the United States Code, commonly called the Anti-Racketeering Act (fols. 10-15). That investigation was concerned with alleged acts of extortion committed in interstate commerce by persons connected with the IATSE (International Alliance of Theatrical Stage Employees and Moving Picture Operators) (fols. 12, 31, 52-53).

The alleged perjurious testimony of petitioner was given by him on June 12, 1942. Prior to his testifying, three

persons indicted by the Grand Jury for violations of the Anti-Racketeering Act had been convicted and sentenced (fols. 33, 40, 90, 94-96, 162, 244-273). One of these defendants was Nicholas Circella, alias Nick Dean.

Circella was indicted on September 29, 1941 (fol. 55). He pleaded not guilty on December 2, 1941, and bail was fixed at $25,000 (fols. 33, 36). On December 4, 1941, petitioner posted as bail for Circella $25,000 in cash (fols. 36-37, 153-154, 202-210). Admittedly, the posting of this bail is the only connection petitioner had with the persons being investigated by the Grand Jury in its investigation under the Anti-Racketeering Act. There is no evidence of any nature of any other connection of petitioner with the alleged extortioners, with the IATSE, or with any person affiliated with it.

Circella pleaded guilty on March 18, 1942, and on April 7, 1942, he was sentenced to eight years' confinement and was fined $10,000 (fols. 21, 33, 40, 152).

After the sentence of Circella, petitioner attempted to obtain a refund of the $25,000 he had posted as bail for Circella. He was told that the government insisted upon retaining it in payment of the $10,000 Circella fine. After consultation with an attorney, petitioner, in order to obtain the release of the remaining $15,000, consented to the retention by the government of $10,000 in payment of the fine imposed on Circella. He then accepted a return of $15,000 (fols. 21, 41, 162, 214-221). Petitioner's consent to the retention by the government of $10,000 was justified at the time by such cases as *Bankers Mortgage Co.* v. *McComb* (C. C. A. 10, 1932), 60 F. (2d) 218; *United States* v. *Werner* (D. C. N. D. Okla. 1931), 47 F. (2d) 351; *Gilbert* v. *Laidlaw* (1886), 102 N. Y. 588. Since then, the Circuit Court of Appeals for the Second Circuit has refused to follow those cases. *United States* v. *Davis,* decided April 30, 1943, not yet reported, affirming 47 Fed. Supp. 176.

On June 12, 1942, petitioner was subpoenaed as a witness before the Grand Jury. His interrogation before the Grand Jury was purportedly to determine whether the

$25,000 he had posted as bail for Circella was part of the proceeds of the IATSE extortions (fols. 34-35, 43, 46).

Petitioner explained before the Grand Jury that he had posted bail for Circella at the request of Mrs. Circella and one Rogers who had agreed to make good any loss and who had held out the prospect of future business to petitioner who is an accountant and tax consultant (fols. 138, 143, 153-154). Petitioner then fully described how the $25,000 bail had been taken from his own personal funds kept in a safe deposit vault (fols. 155-160).

After petitioner had fully testified as to the source of the $25,000, his interrogation before the Grand Jury was continued, although the purported reason for his being called as a witness was the desire of the Grand Jury to determine the source of the $25,000 (fols. 34-35, 43, 46). In the course of this further interrogation, petitioner falsely testified that he had, subsequent to May 1, 1942, loaned $5,000 to one Leo Levy (fols. 165-171). His testimony before the Grand Jury as to the source of the $5,000 purportedly loaned to Leo Levy is vague and conflicting. Whether it came from the $15,000 of the Circella bail that had been returned to petitioner or from his own separate personal funds is not clearly established. The entire testimony of petitioner before the Grand Jury on this subject is as follows:

> "Q. What happened to the $15,000 in cash? What did you do with that? A. I have got most of it, and some of it I have got loaned out * * *" (fol. 164).
>
> "Q. You put it (the $15,000) right back in the vault? A. That's right, that's right. And then I took some of it out" (fol. 165).
>
> "Q. And did it (the $5,000 loan to Leo Levy) come out of the money which you got from the Circella bail? A. It came out of my box. I don't know if it was the exact money or not" (fol. 171).

In spite of the conflict in petitioner's answers, and in the absence of any finding of fact by the trial jury, the

Circuit Court assumed as a fact that the $5,000 loan to Leo Levy came out of the $15,000 returned to petitioner. In its opinion, the Circuit Court quotes "and some of it I have got loaned out" from the testimony at folio 164, completely disregarding the testimony at folio 171.

This unwarranted assumption of fact was an essential part of the theory on which the Circuit Court sustained the Trial Court which had charged, as matter of law, that petitioner's false testimony of a $5,000 loan to Leo Levy was on a "material matter" (fol. 120).

Upon the trial, Irving Hirsch, a brother of petitioner, testified that at the time of the alleged loan to Leo Levy, he borrowed $5,000 from petitioner (fols. 108-109). That testimony corroborated voluntary retractions made by petitioner in a private hearing before the prosecutor a few days after his original Grand Jury testimony (fols. 87, 226-232), and in his second appearance before the Grand Jury four months later (fols. 90, 233-243). In both of these retractions, petitioner testified that the $5,000 loan had been made to Irving Hirsch and not to Leo Levy. Irving Hirsch, although available, was never called as a witness either before the Grand Jury or for private examination by the prosecutor (fols. 110-111).

Neither Leo Levy nor Irving Hirsch was a subject of the Grand Jury investigation. Neither ever had any contact with IATSE or any person connected with IATSE (fols. 80-84, 112). Leo Levy, although twice called as a witness before the Grand Jury, was asked no questions relating to any investigation of IATSE under the Anti-Racketeering Act (fol. 83). His interrogation was solely on the subject matter of the alleged $5,000 loan made to him by petitioner (fol. 84). Irving Hirsch, as already stated, was never called as a witness before the Grand Jury (fol. 111).

The alleged perjury of which petitioner has been convicted was his false testimony of a loan of $5,000 to Leo Levy (fols. 10-15). Although originally subpoenaed before

the Grand Jury to explain the source of the $25,000 bail (fols. 34-35, 43, 46), no charge of perjury has been predicated upon petitioner's testimony that that money was his own. In addition, no evidence was presented to the Grand Jury and none was offered at the trial herein to contradict petitioner on this subject or to prove that the source of the $25,000 was anything other than petitioner's own personal funds. The only testimony in the entire record on this subject is the testimony given by petitioner before the Grand Jury that the $25,000 came from his own personal funds (fols. 155-167).

It is not claimed in this petition that there was insufficient evidence for the trial jury to find that petitioner's testimony that he loaned $5,000 to Leo Levy was wilfully false. This petition is based on the fact that the charge of the Trial Court that such testimony, as matter of law, was material to the investigation of the Grand Jury into extortions in interstate commerce, was error, and that the reasons on which the Circuit Court sustained this ruling require the exercise of the supervisory jurisdiction of this Court.

Reasons for Granting the Writ

1. The decision of the Circuit Court of Appeals for the Second Circuit in this case is in conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in *Clayton* v. *United States* (1922), 284 Fed. 537.

2. The decision of the Circuit Court raises a fundamental problem never passed on by this Court. If the materiality of the testimony of a witness before a Grand Jury depends upon the existence of a basic fact, may that fact be established by speculation and surmise unsupported by any evidence and contrary to the only evidence in the record, or does the universal rule of law apply that such basic fact, like all facts, must be sup-

ported by evidence? This problem involves a fundamental interpretation of the federal perjury statute, a fundamental determination of the powers of grand juries, and a fundamental problem of law not yet passed on by this Court.

3. The decision of the Circuit Court is contrary to the universal common-law rule that the burden of proof in a criminal case is always on the prosecution. *Lilienthal's Tobacco* v. *United States* (1877), 97 U. S. 237, 266. The Circuit Court decision casts upon petitioner, the defendant in a criminal case, the burden of disproving an assumed fact to demonstrate the immateriality of his false testimony.

4. The decision of the Circuit Court of Appeals is contrary to the rule laid down by this Court in *Insurance Co.* v. *Newton* (1874), 89 U. S. (22 Wall.) 32. The *Newton* decision holds as axiomatic the rule that conflicts between admissions and self-serving declarations are to be reconciled only by the finder of fact. In the instant case, although a conflict existed in the testimony of petitioner before the Grand Jury, that conflict was not resolved by the trial jury, although the Circuit Court assumed the truth of the testimony most adverse to petitioner.

5. The decision of the Circuit Court in upholding the Trial Court's charge that petitioner's testimony was on material matter is in conflict with the decisions of other federal courts, the decisions of various state courts and with the common law. The charge by the Trial Court was of necessity based on the Court's reconciliation of conflicting evidence. When materiality depends upon a fact on which there is conflicting evidence, it has always been held that the conflict in evidence is to be reconciled by the trial jury, and not by the Court.

ARGUMENT

1. The decision as matter of law that petitioner's testimony was on a material matter, is based on the assumption of a fact without proof, and, contrary to fundamental, well-settled law, places upon the defendant in a criminal case the burden of disproving the assumed fact.

The Grand Jury interrogation of petitioner was purportedly to determine whether the $25,000 used by petitioner to bail out Circella was his own money or whether it was the proceeds of extortion. The Grand Jury had no proof that the money came from any source other than petitioner's own funds. At no time did it obtain any such proof. The only testimony it ever had was that of petitioner that the money was his own. The inquiry at most was based solely on speculation.

The Circuit Court held petitioner's false testimony material on the ground that the alleged loan to Leo Levy related to the disposition of part of the original bail fund. Part of its reasoning is:

> "We may concede the appellant's argument that if the money really was his, whether or not he made a loan of part of it to Levy was immaterial. But the very issue was whether the money did belong to him. What he did with it was relevant to that issue."

From this, it appears that if petitioner established that "the money really was his," his false testimony was immaterial and he was not guilty of perjury. In the complete absence of proof that the bail money did not belong to petitioner, the Circuit Court has cast on him the burden of proving that it was his own. Under this theory, the interrogation of any witness before a Grand Jury is material if the Grand Jury assumes, without any evidence, a

state of facts which the witness cannot conclusively disprove. This shifting of the burden of proof to a defendant in a criminal case violates a basic rule of the common law. *Lilienthal's Tobacco* v. *United States* (1877), 97 U. S. 237, 266.

In addition, although required by the authorities cited on page 12 of this petition, there was no finding of fact as to the ownership of the bail money. The record being devoid of any evidence to the contrary, as matter of law, the only fact that could have been found was that the money was petitioner's.

The decision of the Circuit Court completely eliminates the requirement of materiality from Title 18, Section 231, U. S. C. All testimony in a Grand Jury is material if the issues are to be determined not by proof but by the unlimited imagination of the Grand Jury.

2. The decision as matter of law that petitioner's testimony was on a material matter, involved the decision by the Trial Court, contrary to fundamental, well-settled law, of disputed questions of fact which should have been submitted to the trial jury.

From the opinion of the Circuit Court, it appears that the Court held that the false testimony of petitioner was on a material matter since it pertained to "what disposition he made of $5,000 of the returned bail money" (Opinion of Circuit Court). The theory of the Court appears to be that the Grand Jury was tracing the Circella bail money and that the supposed $5,000 loan to Leo Levy allegedly came from that particular money. In reaching its conclusion, the Court in its opinion quotes from folio 164 of the record (see p. 5, this petition). No reference is made by the Court to the following specific interrogation relating to the same subject:

> "Q. And did it (the $5,000 loan to Leo Levy) come out of the money which you got from the

> Circella bail? A. It came out of my box. I don't know if it was the exact money or not" (fol. 171).

The only testimony in the record as to any connection between the alleged $5,000 loan to Leo Levy and the Circella bail money is the conflicting admissions of petitioner set forth in full on page 5 of this petition.

There is an obvious inconsistency and conflict between the admissions at folios 164 and 165 and the admission at folio 171. The answer at folio 171, if found to be the truth, does not sustain the theory of the Circuit Court, as expressed in its opinion, that "the appellant's falsehood as to what disposition he made of *$5,000 of the returned bail money* had, in our opinion, a natural tendency to impede the grand jury's inquiry * * *." That answer, standing alone, constitutes a failure of proof.

It is fundamental settled law that admissions must be taken as an entirety and the resolution of conflicts and inconsistencies is for the trier of the facts.

> *Insurance Company* v. *Newton* (1874), 89 U. S. (22 Wall.) 32;
>
> *Perrin* v. *United States* (C. C. A. 9, 1909), 169 Fed. 17;
>
> *Nelson* v. *Rural Educational Ass'n* (1939), 23 Tenn. App. 409, 134 S. W. 2d 181, 190, cert. den. Tenn. ;
>
> *State* v. *Dunkley* (1935), 85 Utah 546, 39 Pac. 2d 1097, 1109;
>
> *Concrete Steel Co.* v. *Reinforced Concrete Co.* (Mo. App., 1934), 72 S. W. 2d 118;
>
> *Jones, Commentaries on Evidence* (2d Ed.), Vol. III, Sec. 1063.

As was said in *Insurance Company* v. *Newton,* supra, at p. 35:

> "Every admission is to be taken as an entirety of the fact which makes for the one side, with the

> qualifications which limit, modify, or destroy its effect on the other side. This is a settled principle which has passed by its universality into an axiom of the law."

A finding by the Court that the $5,000 was part of the Circella bail fund was an invasion by the Court of the province of the jury. Since materiality depended, under the theory of the Court, upon whether or not the $5,000 was part of the bail fund, that fact should have been submitted to the jury.

Whenever the evidence upon which materiality is to be decided is in conflict, the facts must be submitted to the jury. The Court should charge what findings would constitute materiality and which would not.

> *United States* v. *Shinn* (Ct. Ct. Oreg., 1882), 14 Fed. 447;
> *People* v. *Redmond* (2d Dept., 1917), 179 App. Div. 127, app. dism. 225 N. Y. 206;
> *Foster* v. *State* (1929), 179 Ark. 1084, 20 S. W. 2d 118;
> *Coleman* v. *State* (1911), 6 Okl. Cr. 252, 118 Pac. 594;
> *Wilkinson* v. *People* (1907), 226 Ill. 135, 80 N. E. 699;
> *Wharton, Criminal Law* (12th Ed.), Vol. II, Sec. 1550.

"Where the facts are disputed, the question should be left to the jury, with proper instructions from the court." *United States* v. *Shinn,* supra, at p. 452.

The Trial Court charged as matter of law that petitioner's false testimony was material. By so doing, the Court itself necessarily resolved a question of fact against petitioner. The Court's failure to submit that question to the jury was in violation of well-established rules of law.

3. There is a conflict between the Second Circuit and the Fourth Circuit that should be reconciled by this Court.

The decision of the Circuit Court for the Second Circuit in this case is in conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in *Clayton* v. *United States* (1922), 284 Fed. 537. In its brief submitted in the Circuit Court, respondent admitted that the *Clayton* decision, if good authority, required the reversal of the judgment of the District Court. Its argument was that the *Clayton* case should not be followed. The Circuit Court for the Second Circuit, in its opinion herein, makes no attempt to distinguish the *Clayton* decision.

In the *Clayton* case, Clayton was a witness before a Grand Jury that was inquiring into violations of the National Prohibition Act. He falsely denied that he had purchased any intoxicating liquor during the time under investigation. He also falsely denied being intoxicated durng that time. The Circuit Court of Appeals for the Fourth Circuit held that his false denial of the purchase of liquor was on a material matter since it concerned the fundamental fact being investigated. The Court held, however, that his denial of being intoxicated was not on a material matter.

It is impossible to reconcile the decision in the *Clayton* case with the decision in the instant case. Had Clayton admitted being intoxicated, he would have been compelled to testify before the Grand Jury as to the source of the liquor, the very matter under investigation. The distinction drawn in the *Clayton* case is in direct conflict with the theory of the Circuit Court decision in this case. Here, the Court relied upon broad, general language quoted from its prior opinion in *Carroll* v. *United States* (1927), 16 F. (2d) 951, cert. den. 273 U. S. 763. The theory of the *Carroll* case would require a holding that Clayton's false testimony as to his intoxication undoubtedly influenced

and impeded the investigation being conducted by that Grand Jury.

The language quoted from the *Carroll* case was unnecessary to the decision of that case. There the false testimony of the defendant related to the persons present at the very time of the commission of the crime being investigated. Such testimony would have been material even upon a trial before a petit jury. The broad statement in the *Carroll* case as to the test of materiality before grand juries was unnecessary under the facts of that case.

The *Clayton* case places a limit upon materiality before a Grand Jury. Under the broad language of the *Carroll* case, quoted and relied on by the Circuit Court in its opinion herein, there is no limit. Whether a limit exists, and what that limit is, should be determined by this Court.

CONCLUSION

It is urged that the instant case involves fundamental problems of law never passed on by this Court, and that the decision of the Circuit Court for the Second Circuit is in conflict with decisions of this Court, decisions of State and other Federal courts and well-settled fundamental principles of the common law. It is urged further that this Court should definitively determine the test of materiality in Grand Jury proceedings. For these reasons, it is urged that the questions presented and the conflict of opinion with respect to them require the exercise of this Court's supervisory jurisdiction.

Respectfully submitted,

Loring M. Black,
Milton Schilback,
Attorneys for Petitioner.

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 260

MARTIN A. HIRSCH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 103–105) is not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered July 19, 1943 (R. 106). The petition for a writ of certiorari was filed August 12, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether the trial court correctly instructed the jury that, as a matter of law, petitioner's allegedly perjurious testimony before the grand jury related to a matter material to the inquiry of that body.

STATUTE INVOLVED

Section 125 of the Criminal Code (18 U. S. C. 231) provides:

> Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than $2,000 and imprisoned not more than five years.

STATEMENT

Petitioner was indicted for perjury in the United States District Court for the Southern District of New York. The indictment charged that on June 12, 1942, the grand jury for that district was inquiring into an alleged violation of the Anti-Racketeering Act of June 18, 1934, c. 569, 48 Stat. 979, 18 U. S. C. 420a *et seq.;* that on that date petitioner was sworn and examined

in the course of that inquiry; that petitioner, being under oath, wilfully, falsely, and contrary to his oath, testified that within one month and one-half prior to June 12, 1942, he loaned $5,000 in cash to one Leo Levy, well knowing the truth to be that he did not loan $5,000 to Leo Levy during such period; and that the matter to which petitioner falsely testified was material to the inquiry of the grand jury. (R. 4–5.)

The evidence adduced by the Government at the trial showed that during the years 1941 and 1942 the grand jury which indicted petitioner was investigating alleged violations of the Anti-Racketeering Act on the part of various representatives of the International Alliance of Theatrical Stage Employees and Moving Picture Operators, a labor union, and other persons. On the basis of evidence in its possession the grand jury concluded that over a million dollars had been extorted from members of the motion-picture industry. (R. 11–12, 16–18.) This investigation led to the return of two indictments (R. 11, 18–19, 82–83, 89–91), one of which, returned on September 29, 1941, charged one Nick Circella and another with violating the Anti-Racketeering Act (R. 11, 89–91). Circella's bail, fixed at $25,000, was furnished by petitioner, who deposited that amount in cash and executed a recognizance before the clerk of the district court (R. 12–13, 68–70). Circella subsequently pleaded guilty and was sentenced to imprisonment and to pay a fine of $10,000, whereupon

petitioner consented by a written stipulation to the payment of the fine from the cash bail. The fine was paid therefrom and the balance, $15,000, was returned to petitioner by the clerk in April 1942. (R. 14, 71–75.)

The grand jury, after returning the indictments already mentioned, was convinced that all the money extorted from members of the motion-picture industry had not gone to the defendants named therein. Among other things, the grand jury discovered that some of this money had gone to a "so-called mob in Chicago," and it felt that a careful investigation into the sources and disposition of the money involved would reveal the names of other persons involved in the "racket." (R. 12, 15–17, 20.) Accordingly, persons connected with those who had already been indicted were subpoenaed by the grand jury (R. 17). The grand jury also determined to investigate the source of the $25,000 in cash which had been deposited as bail for Circella, as well as the disposition of the $15,000 that remained after payment of his fine (R. 15–17).

On June 12, 1942, petitioner was called before the grand jury and testified under oath (R. 15). The stenographic transcript of his testimony before the grand jury (R. 46–67) was introduced in evidence at the trial (R. 10). This transcript shows that petitioner testified that the $25,000 cash was his own money which he had taken from his safe deposit box, that he posted it as bail for Circella, who

was a stranger to him, at the request of a friend named Rogers, and that he received no fee for the use of the money (R. 51–54, 59). He was then asked what he did with the $15,000 which was returned to him, and he replied that he put it back in his safe deposit box and later took $5,000 from the box and loaned it to a friend (R. 55–57). After an unsuccessful attempt to avoid revealing the name of this friend, petitioner first said that the loan was made to one Leo Levy, then retracted the statement and said that he made no such loan, and finally repeated his original statement that he did make such a loan to Levy (R. 56–59). Subsequently petitioner admitted, both in a voluntary statement to an assistant United States attorney (R. 76–78) and when he appeared a second time before the grand jury (R. 78–81), that he made no loan to Levy and that his testimony to that effect was not correct. He stated that he had loaned $5,000 to his brother, Irving Hirsch, but did not want to bring the latter's name into the case (R. 76, 79). At the trial, Levy, called as a witness for the Government, testified that he had never borrowed more than $15 from petitioner (R. 22, 25), while Irving Hirsch testified for the defense that he borrowed $5,000 from petitioner during the early part of May 1942 (R. 36).

At the outset of his charge to the jury the trial judge told them that the question whether petitioner's testimony before the grand jury related

to a material matter within the meaning of the perjury statute, was a question of law to be determined by the court, and he then charged the jury that the testimony was material and that the issues for their determination were whether it was false and wilfully so (R. 40).

Petitioner was convicted (R. 2, 44) and sentenced to imprisonment for two years and to pay a fine of $2,000 (R. 2, 45). Upon appeal to the Circuit Court of Appeals for the Second Circuit, the judgment of conviction was affirmed (R. 103–106).

ARGUMENT

Although he does not purport to question the rule that the materiality of allegedly perjurious testimony is ordinarily a question for the trial court, not the jury, to determine,[1] petitioner asserts that the instruction of the trial court in the instant case that his testimony before the grand jury was material was based upon unwarranted assumptions of fact (1) that the $25,000 in cash deposited as Circella's bail was not petitioner's own money, and (2) that the loan which he falsely testified he had made to Levy was from part of

[1] *Sinclair* v. *United States*, 279 U. S. 263, 298–299; *Travis* v. *United States*, 123 F. (2d) 268, 270 (C. C. A. 10); *Blackmon* v. *United States*, 108 F. (2d) 572, 573 (C. C. A. 5); *United States* v. *Slutzky*, 79 F. (2d) 504, 506 (C. C. A. 3); *Luse* v. *United States*, 49 F. (2d) 241, 245 (C. C. A. 9), certiorari denied, 290 U. S. 651; *Carroll* v. *United States*, 16 F. (2d) 951, 954 (C. C. A. 2), certiorari denied, 273 U. S. 763; cf. *United States* v. *Shinn*, 14 Fed. 447, 452 (C. C. D. Ore.).

the bail money; and, hence, that the trial court should not properly have treated the matter of materiality as a question of law (Pet. 9–12).

(1) In respect of the matter of the ownership of the money, petitioner argues (Pet. 9–10) that since he testified before the grand jury that it was his (R. 52–53), and there was no proof that it was any part of the extortion money, it was no concern of that body what he did with it and therefore his false testimony concerning a loan to Levy could not have been material; and that, accordingly, the court's determination of materiality was predicated upon an assumption of a fact which was wholly without supporting proof. This argument rests upon a misconception of the true test of materiality as applied to the grand jury's investigation.

The test of materiality is whether the false testimony has a natural tendency to influence, impede, or dissuade the grand jury from pursuing its investigation. It is not necessary that such testimony concern any particular issue, and it need not directly affect the result. *Carroll* v. *United States,* 16 F. (2d) 951, 953 (C. C. A. 2), certiorari denied, 273 U. S. 763; *Blackmon* v. *United States,* 108 F. (2d) 572, 574 (C. C. A. 5); *United States* v. *Slutzky,* 79 F. (2d) 504, 506 (C. C. A. 3). False testimony in any step of the grand jury's investigation may tend to influence or impede the course of the investigation, and if so it is material

even though not essentially relevant to the ultimate issues. *Carroll* v. *United States, supra.*

Petitioner's false testimony was clearly material within the meaning of this rule. The grand jury, after returning two indictments, one against Circella and another alleged extortionist, determined to press their investigation into the disposition of the extortion money with a view to ascertaining the identity of others who, the jury was satisfied, were involved in the scheme. Quite naturally, their attention focused upon the $25,000 in cash which petitioner had deposited as bail for Circella, $10,000 of which was used to pay his fine, and their questioning of petitioner was designed to elicit information as to whether that money was part of the proceeds of the extortion scheme. If it was, petitioner's testimony as to what he did with the $15,000 remaining after the payment of Circella's fine was clearly material, for, as the court below said, "if he turned it over to other persons the jury might be able to connect them with the crimes under investigation" (R. 105). The materiality of petitioner's testimony in that regard was not affected by his assertion of ownership of the bail money. The grand jury was not bound to accept that claim and abandon further inquiry,[2]

[2] To the contrary, considering the facts that petitioner had testified that he took $25,000 in cash from his safe deposit box to bail Circella, who was a stranger to him, and this without any compensation to himself, and that he had consented to the payment of Circella's $10,000 fine from the bail money

for, as indicated, the disposition he made of the money had a material bearing upon the truth of his testimony that it was his own. The grand jury could accordingly ask any questions which threw light on the issue of the source whence petitioner obtained the money, including questions as to what he did with the balance of $15,000. All such questions petitioner was bound to answer truthfully, for any false answer as to the disposition he made of this money had a natural tendency to influence, impede, or dissuade the grand jury in its inquiry to determine whether the cash used for Circella's bail came from the moneys derived from the extortion plot. The materiality of petitioner's false testimony concerning a loan to Levy, therefore, cannot be doubted, notwithstanding his prior testimony that the bail money was his own.

(2) Petitioner also contends (Pet. 10–12) that there was an inconsistency in his testimony before the grand jury as to whether the $5,000 loan which he falsely testified he had made to Levy was from the $15,000 balance of the bail money returned to petitioner after the payment of Circella's fine. He argues that his testimony, subsequent to his false statement, that the $5,000 "came out of my box" and that he did not "know if it was the exact money or not" (R. 57), was inconsistent with his prior statement that the loan was

(see pp. 3–5, *supra*), it would seem clear that the grand jury was entitled to pursue this line of inquiry further in order to test the truth of this highly unusual story.

from the bail money (R. 55), and that this "disputed question of fact" (Pet. 10) should have been submitted to the trial jury. This contention is specious. The questioning of petitioner as to the identity of the borrower of the $5,000 and petitioner's false answer followed immediately after his testimony that he loaned $5,000 of the bail money to a "friend" (R. 55–56). We have already demonstrated (*supra*, pp. 7–9) the materiality of his false statement that the loan was to Levy. Obviously, its materiality was in no wise affected by his subsequent assertion of lack of knowledge as to whether the loan was made from the bail money. Indeed, in the light of the facts known to the grand jury at the time, it was unimportant whether the loan was in fact made from the bail money, for petitioner's actions in connection with the bail transaction would clearly have justified an inquiry into the sources of the other cash he had in his safe deposit box to determine whether it, too, was part of the proceeds of the extortion scheme.

CONCLUSION

The case was correctly decided below and it presents no conflict of decisions[3] or question of

[3] In *Clayton* v. *United States*, 284 Fed. 537 (C. C. A. 4), upon which petitioner relies as establishing a conflict of decisions (Pet. 13–14), the court held that it was immaterial, in an investigation concerning violations of the National Prohibition Act, for the grand jury to know whether the defendant had ever been intoxicated in the period of a year and a

general importance. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1943.

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half preceding the investigation and that, therefore, his false testimony that he had not been was not punishable under the perjury statute. The court said that since intoxication was not an offense under the Prohibition Act, the grand jury had no right to inquire, as an independent subject of investigation, whether the defendant had been intoxicated, and that in any event the mere fact of his intoxication had no legitimate tendency to show that some other person had violated the act. The court stated, moreover, that its holding was based "upon the facts of this case, and without intending to lay down any absolute rule" (p. 541). This decision obviously does not support petitioner's assertion of a conflict with the decision below, for here, as we have shown (*supra*, pp. 7–9), petitioner's false testimony bore a direct and intimate relation to the subject of the grand jury's inquiry.

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(12)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

MARTIN A. HIRSCH, *Petitioner,*
against
UNITED STATES OF AMERICA, *Respondent.*
No. 260

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

LORING M. BLACK,
MILTON SCHILBACK,
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Argument

1. A fundamental problem never passed on by this Court is presented by the instant case.

Respondent in its brief in opposition attempts to make petitioner's posting of bail for Circella a "highly unusual story" (Respondent's Brief in Opposition, pp. 8-9, footnote). The details of the transaction show that it was not in the least unusual. Petitioner explained in detail before the Grand Jury that he had posted bail for Circella at the request of Mrs. Circella and a friend, Joseph Rogers, who had agreed to make good any loss and who had held out the prospect of substantial future business to petitioner who is an accountant and tax consultant (fols. 138, 143, 153-154). In addition, Circella had just surrendered himself to the authorities (fols. 152-153) and the risk of loss was negligible. Petitioner's consent to

the retention by the Government of $10,000 was after consultation with an attorney (fol. 162) and was required by then existing judicial authority (see Petition, p. 4).

Respondent argues that the mere posting of bail by petitioner made his personal finances a subject of inquiry material to the Grand Jury investigation under the Anti-Racketeering Act. It is argued that it would even have been material to the Grand Jury investigation to inquire "into the sources of the other cash he had in his safe deposit box to determine whether it, too, was part of the proceeds of the extortion scheme" (Respondent's Brief in Opposition, p. 10). This claim is made although admittedly the posting of bail for Circella is the only connection petitioner had with the persons being investigated by the Grand Jury. In addition, it is made in spite of the fact that the only evidence in the whole record on the source of the $25,000 Circella bail is petitioner's testimony before the Grand Jury that the money was his own. There is no evidence of any nature that the $25,000 or any part of it came from any other source or had any connection with the extortion proceeds.

Under the theory of respondent, the element of materiality is removed from the perjury statute. Any person may be called before a Grand Jury and interrogated about his personal finances. That inquiry can then be justified as material by the claim that the Grand Jury, although it had no proof, suspected that the witness's finances had some connection with the crime it was investigating. If the test of materiality is satisfied by the unrestricted imagination of grand juries, that element of the crime is removed from the perjury statute.

It is respectfully submitted that this Court should finally determine the test of materiality in Grand Jury proceedings.

2. A conflict exists between the instant case and the decision in *Clayton* v. *United States* (C. C. A. 4, 1922), 284 Fed. 537.

Respondent attempts to reconcile the decision in *Clayton* v. *United States* (C. C. A. 4, 1922), 284 Fed. 537, with the decision in the instant case (Respondent's Brief in Opposition, pp. 10-11, footnote). The intoxication of Clayton admittedly was not an offense under the Prohibition Act so as to constitute an independent subject of investigation. Likewise, the existence or non-existence of a $5,000 loan by petitioner to Leo Levy was not an offense under the Anti-Racketeering Act so as to constitute an independent subject of investigation.

Respondent's argument that Clayton's false testimony did not bear a direct and intimate relation to the subject of the Grand Jury's inquiry, while petitioner's did, is untenable. Respondent attempts to justify materiality in the instant case by arguing that petitioner's testimony had a natural tendency to influence, impede and dissuade the Grand Jury from pursuing its investigation (Respondent's Brief in Opposition, p. 7). The authority for this rule is *Carroll* v. *United States* (C. C. A. 2, 1927), 16 F. (2d) 951 cert. den. 273 U. S. 763. Although the *Carroll* case contains such language, the decision in the case does not justify any such broad rule (see Petition, pp. 13-14). The other two cases cited by respondent, *Blackmon* v. *United States* (C. C. A. 5, 1940), 108 F. (2d) 572, and *United States* v. *Slutzky* (C. C. A. 3, 1935), 79 F. (2d) 504, are concerned with perjury committed on a trial before a petit jury and not in grand jury proceedings. Neither of them lays down any such broad rule.

The language of the *Carroll* case was relied on and quoted by the Circuit Court for the Second Circuit in its opinion in this case. An application of that language to the facts of *Clayton* v. *United States,* supra, demonstrates that the *Clayton* case and the instant case are in definite,

irreconcilable conflict. Had Clayton admitted his intoxication, the Grand Jury would at once have inquired into the source of the intoxicating liquor, the very subject of the entire Grand Jury inquiry. Clayton's false testimony inevitably had a natural tendency to influence, impede and dissuade that Grand Jury from pursuing its investigation. Under the test of the *Carroll* case as adopted by the Circuit Court for the Second Circuit in its opinion in the instant case, Clayton's false testimony was inescapably on a material matter.

CONCLUSION

The instant case presents a fundamental problem of law never passed on by this Court, and is in conflict with the rule of the Fourth Circuit. For these reasons, and those set forth in the petition herein, it is urged that the questions presented and the conflict of opinion with respect to them require the exercise of this Court's supervisory jurisdiction.

Respectfully submitted,

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